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SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-570

THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT J. HIRSH, Petitioner, vs. MARTINDALE-HUBBELL, INC., Respondent.	ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Does the requirement of Respondent that, in order for a qualified lawyer or lawfirm to purchase advertising in the form of an informative or a professional card in its Martindale-Hubbell Law Directory, the lawyer or lawfirm must also purchase the Law Directory volumes themselves, constitute a violation of section 1 of the Sherman Act, 15 U.S.C. §1, as a prohibited tie-in sale, because the advertising and the directory volumes constitute "separate products" under the applicable decisions relating to tie-in sales?

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ROBERT J. HIRSH,	)	
	)	
Petitioner,	)	ON WRIT OF
	)	CERTIORARI TO
vs.	)	THE UNITED STATES
	)	COURT OF APPEALS
MARTINDALE-HUBBELL,	)	FOR THE NINTH
INC.,	)	CIRCUIT
	)	
Respondent.	)	
_____	)	

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REFERENCES TO REPORTS OF OPINIONS BELOW.

(a) United States Court of Appeals for the Ninth Circuit, Robert J. Hirsh, Appellant v. Martindale-Hubbell, Inc., Appellee, No. 81-5070, opinion filed April 23, 1982, reported at 674 F.2d 1343 (9th Cir. 1982), reproduced in Appendix, infra.

(b) United States District Court for the District of Arizona, Robert J. Hirsh, Plaintiff v. Martindale-Hubbell, Inc., Defendant, No. CIV-79-226-TUC-RMB, opinion filed January 8, 1981, reported at 505 F.Supp. 114 (D. Ariz. 1981), reproduced in Appendix, infra.

GROUNDS UPON WHICH JURISDICTION INVOKED.

(a) Date of Judgment sought to be reviewed: April 23, 1982, entered April 23, 1982.

(b) Date of Order denying petition

for rehearing: June 15, 1982.

(c) Statutory provision believed to confer jurisdiction to review judgment by writ of certiorari: 28 U.S.C. §§ 1254, 2101.

STATUTE WHICH THE CASE INVOLVES.

The Sherman Act, 15 U.S.C. §1 (in pertinent part):

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . ."

STATEMENT OF THE CASE

The Complaint in this case was filed in the United States District Court for the District of Arizona on August 8, 1979, alleging that Petitioner, Robert J. Hirsh, a practicing lawyer, had been injured in his business or property by reason of federal antitrust violations

of Respondent Martindale-Hubbell, Inc. The action was brought as a class action seeking damages, declaratory and injunctive relief on the basis that Respondent had violated the antitrust laws through "tie-in" sales in contravention of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, and by monopolization and attempt to monopolize in contravention of Section 2 of the Sherman Act, 15 U.S.C. § 2. Jurisdiction in the district court was founded on 15 U.S.C. §§ 15, 26, and 28 U.S.C. § 1337.

Respondent answered the Complaint, and discovery was conducted as to both the issues relating to class certification and the merits of the case. Motion for class certification was made and the ruling thereon deferred pending a determination of liability. The parties'

motions and cross-motions for summary judgment which are the subject of this petition were ruled upon in favor of Respondent. Appeal was then taken to the United States Court of Appeals for the Ninth Circuit from the district court's judgment in favor of Respondent on the tie-in allegations, and that court affirmed the district court judgment on April 23, 1982. Rehearing of the appeal, and Petitioner's Suggestion of Rehearing en banc were denied by order dated June 15, 1982. See Appendix.

STATEMENT OF FACTS MATERIAL TO QUESTION PRESENTED. */

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*/ The case arises upon cross-motions for summary judgment, and both courts below have deemed the facts sufficiently at issue and undisputed to allow for such a disposition. See 505 F.Supp. at 114; 674 F.2d at 1346. This statement of facts, therefore, is simply a digest of the facts relevant to the "one-product" issue which were presented to and found by the lower courts.

Petitioner, Robert J. Hirsh, is a lawyer who has practiced law in Tucson, Arizona, for approximately 15 years. He graduated from the University of Arizona in 1964. In addition to his membership to the State Bar of Arizona, he is also a member of the American Bar Association, and the National Association of Defense Counsel. Petitioner specializes almost exclusively in criminal law, although past and present partners and associates of Petitioner also handle civil and administrative law matters.

Petitioner, under Respondent's lawyer rating system, is rated as an "av" lawyer, the highest rating attainable under the rating system. During the years 1975 through 1979, Petitioner was a subscriber to Respondent's Martindale-Hubbell Law Directory, i.e., in each of those years he purchased a "professional card" in the

directory together with a complete set of the directory itself, and paid Respondent the prevailing price for them. In March, 1979, Petitioner terminated this arrangement with Respondent and notified Respondent that the volumes of the 1979 edition would be returned.

Respondent, Martindale-Hubbell, Inc., is a corporation which was organized in 1941 under the laws of the State of Delaware. In 1868 the Martindale Mercantile Agency, Inc., began publishing Martindale's United States Law Directory (later Martindale's American Law Directory). In 1870 Hubbell Publishing Company began issuing Hubbell's Legal Directory. In 1930 Martindale acquired the publishing rights to Hubbell's and Martindale-Hubbell, Inc., a New York corporation, was organized. The present Martindale-Hubbell, Inc., is a successor company to the New York

corporation. In addition to its publication of the Martindale-Hubbell Law Directory, Respondent owns the Bar Register Company, Inc., which annually publishes the Bar Register.

Since 1931 Respondent has been publishing an annual directory of lawyers, the Martindale-Hubbell Law Directory (the directory). The directory began with one volume per annual edition, then in 1931 it added a second volume, with additional volumes being added in 1948, 1958, 1968, 1975 and 1978, so that as of the 1979 edition a complete annual edition consists of seven volumes. An eighth volume has been added to the 1981 edition. Of the seven volumes of the 1979 edition, six contain listings of virtually all American and Canadian attorneys and of certain attorneys for foreign countries. The seventh volume

contains concise digests of the statutory laws of the several states, the federal government, the Canadian government and provinces, and several foreign countries; various uniform laws; and the ABA "red-book" of persons in ABA leadership positions.

The directory is the nation's leading annual directory of attorneys and the only directory of its kind expressly approved by the American Bar Association.

The price of the multi-volume directory in the years 1975 through 1979, and its total circulation in each of those years was as follows:

1975 - $ 90.00 - 34,059
1976 - 100.00 - 34,830
1977 - 100.00 - 35,866
1978 - 110.00 - 37,268
1979 - 110.00 - 38,358

Respondent sells and distributes the

law directory throughout the United States and Canada, and internationally, to individual attorneys and lawfirms, public agencies and government agencies, private companies and concerns, libraries, and private and public schools. It is distributed to buyers chiefly by the United States Postal Service and foreign mail service. Respondent gathers and compiles much of the information which it obtains in creating the directory, and makes most of its sales, through the use of employees who travel throughout the United States, Canada and in foreign countries. Respondent also utilizes the United States, Canadian and foreign mails in obtaining the information which it publishes, by conducting inquiries of lawyers and judges by mail throughout the United States, Canada and foreign countries.

The volumes of the directory which contain the law lists (six of the seven volumes of the 1979 edition) are divided into the geographical bar roster, the patent lawyers' roster and the biographical section. The geographical section and patent lawyers' section consist of individual, alphabetical listings by states and cities of individual attorneys and lawfirms compiled by Respondent and published at no charge to the parties listed; and of "informative cards" that can be purchased by any practicing attorney or lawfirm. Informative cards provide information additional to that contained in the individual listings. The biographical section of the directory contains "professional cards." These can be purchased only by attorneys and lawfirms who attain an "av" or "bv" rating under the Martindale-Hubbell rating system.

The professional cards provide information additional to that appearing in either the individual listings or the informative cards.

The individual, alphabetical listings contained in the geographical and patent-law rosters provide the following information: the individual attorney's name, street or mailing address of law office or home, date of birth, and dates of preparatory- and law-school degrees. Certain other information is provided by coded symbols. There are also individual, alphabetical listings of law-firms, which provide the name of the lawfirm and a partial street or mailing address. These lists are maintained alphabetically, by last name of the lawyer or lawfirm, and are organized alphabetically by city or town, and by state.

Informative cards, also maintained

in the geographical and patent-law rosters of the directory, are published for lawyers and lawfirms who wish to purchase a card (no rating is necessary), and may also be purchased by corporate legal departments and certain other law-related businesses. Informative cards list information additional to that found in the individual listings, such as the telephone number and the zip code of the lawyer or lawfirm, the names of the partners and the associates of the lawfirm, areas of legal emphasis or specialty, references, and representative clients. In the case of the corporate legal departments or law-related businesses, the informative cards contain addresses and telephone listings, a description of services and similar information.

During the years 1975 through 1979,

the prices for an informative card purchased by a lawyer or lawfirm were as follows:

1975 - $10.00 per lawyer in card (up to 10 maximum) no informative card charge

1976 - $15.00 per lawyer in card (up to 10 maximum) no informative card charge

1977 - $15.00 per lawyer in card (up to 10 maximum) plus $5.00 informative card charge

1978 - $17.00 per lawyer in card (up to 12 maximum) plus $5.00 informative card charge

1979 - $17.00 per lawyer in card (up to 12 maximum) plus $10.00 informative card charge

The professional cards, which appear in the biographical section of the law-list volumes of the directory are, as

noted above, available only to lawyers engaged in the practice of law either individually or in a lawfirm. The individual practicing lawyers must have an "av" or "bv" rating to be able to buy a professional card, and as to lawfirms having such cards, at least one member of the lawfirm must have an "av" or "bv" rating. Respondent, from time to time, determines that a lawfirm in which one or more lawyers have an "av" or "bv" rating may nevertheless not be eligible to place a professional card in the directory because Respondent possesses adverse information concerning another member of the lawfirm of such a character as to impair the firm image as an entity. These ratings of lawyers are made on the basis of investigation of, and inquiry of opinions of lawyers and judges as to the particular lawyer's legal ability (the

"a" or "b" portion of the rating) and the ethics, reliability and diligence of the lawyer (the "v" portion of the rating).

Professional cards appearing in the biographical section of the law directory provide information additional to that provided in either the individual listings or the informative cards. The professional card may include the lawyer's accomplishments and awards, his fields of specialization, names of representative clients, and references. Professional cards may also show the lawyer's legal and honor fraternities and associations; law-school honors such as law-review status or Order of the Coif; position of honor such as law-clerkships or teaching positions; names and dates of published legal articles; military service; and full prelegal, legal and post-legal

education and degrees. This information may be presented as to both partners and associates of the lawfirm and is set forth in readable, non-coded form.

Professional cards may range in size from a minimum of one-sixth of a page to more than a dozen pages, depending upon the size of the lawfirm and amount of information which is presented in the professional card. During the years 1975 through 1979 the charges made by Respondent for the professional card have been as follows:

1975 - $57.00 per one-sixth page
1976 - 57.00 per one-sixth page
1977 - 60.00 per one-sixth page
1978 - 60.00 per one-sixth page
1979 - 65.00 per one-sixth page

Respondent requires, as a condition of purchase by a lawyer or lawfirm of a professional card in the biographical section,

or of an informative card in the geographical or patent-law roster, that the buyer of the card also purchase the directory itself. And a purchasers of a professional card in the biographical section must also purchase an informative card in each annual directory in which the professional card appears. The requirement that the purchaser of an informative card in the geographical bar roster also buy the directory applies only to lawyers, even though non-lawyers (such as corporation law departments or law-related businesses) may purchase informative cards in the geographical bar roster. To maintain the professional card or the informative card in each year's directory, the attorney or lawfirm must agree to purchase the directory in each such year. There are two exceptions to this rule: Foreign attorneys may purchase advertising

without buying the directory and qualified attorneys may purchase advertising if another attorney with whom the qualified attorney shares office space purchases the directory.

Thus, a lawyer or lawfirm wishing to maintain an informative card in the geographical section of each year's edition is required to pay for that card at the rates recited above for the card itself, and to pay for each year's edition of the directory. An annual purchaser of a professional card in the biographical section must pay for the professional card itself (per one-sixth page, as shown above), the informative card, and each year's edition of the volumes. Using Petitioner's purchases as an example, for the years 1975 through 1979, in each of which he purchased a professional card in the directory, Petitioner paid:

Year	Volumes	Advertising	Total
1975	$ 90.00	Info. Card- $20.00 (2 lawyers) Prof. Card- $114.00 2/6 page	$224.00
1976	$100.00	Info. Card- $45.00 (3 lawyers) Prof. Card- $171.00 3/6 page	$316.00
1977	$100.00	Info. Card- $60.00 (4 lawyers) + $5.00 card charge Prof. Card- $180.00 3/6 page	$345.00
1978	$110.00	Info. Card- $34.00 (2 lawyers) + $5.00 card charge Prof. Card- $180.00 3/6 page	$329.00
1979	$110.00	Info. Card- $51.00 (3 lawyers) + $10.00 card charge Prof. Card- $195.00 3/6 page	$366.00

Respondent itemizes the price of the directory, the professional card and the informative card as separate components of the total price to be charged for the professional or informative cards.

Respondent sells the multi-volume directory by itself to lawyers, public agencies, libraries, businesses and other purchasers, and as indicated above charges for the multi-volume set have been, in the period 1975 through 1979, between $90.00 and $110.00, the same price as that charged to purchasers of advertising cards. Respondent also sells the individual law-digest volume to certain purchasers, but not to attorneys. And Respondent sells individual volumes of the directory to lawyers only if they have already purchased the entire directory.

Respondent advertises the sale of

the directory independently of the sale of the professional or informative cards. In 1979, Respondent spent approximately $5000.00 on advertising of the directory. Respondent has created brochures for advertisement of the directory itself and has issued instructions to its sales personnel on methods for sale of the directory. Respondent maintains separate, itemized costs of manufacturing the directory, and of soliciting advertising, and maintains separately the income figures derived from the sales of the directory itself and from the sales of the advertising within the directory.

The present format of the Martindale-Hubbell Law Directory is a historical product, the result of the merger of the two parent companies. Martindale's American Law Directory contained the law digest section and the geographical section,

including advertising comparable to the present informative card. Hubbell's Legal Directory contained the forerunner of the present biographical section. These features were combined together with the merger of the companies and the resulting format has been followed, virtually unchanged, since 1931.

The requirement that lawyers buying the professional or informative cards in the directory also purchase the directory itself (and that a buyer of a professional card purchase the informative card as well) have a long history with Respondent dating back to the inception of the directory. Respondent's present officers are unaware of the precise historical origin of the practices.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

By its holding that Respondent's annual volumes of its lawyers' directory,

and the advertising Respondent sells therein to lawyers, constitute a "single product" for purposes of tie-in sale analysis under section 1 of the Sherman Act, the court below has created substantial conflict with both applicable decisions of this Court and decisions of other federal courts on the issue. */ Furthermore, the instant opinion has so obfuscated and departed from existing law as applied to tie-in sales as to require this Court's issuance of the writ of certiorari so as to clarify the law on these issues in the lower federal courts.

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*/ This Petition does not raise the two other issues dealt with by the Court of Appeals: the tie-in between the professional card advertising and the informative-card advertising, and the question of whether advertising is a "commodity" under section 3 of the Clayton Act, 15 U.S.C. §14.

This Court is of course aware of its own long-standing aversion to tie-in sales, dating at least from International Salt Co. v. United States, 332 U.S. 392 (1947). That case, and several others from this Court following it, have established that tie-in sales "serve hardly any purpose beyond suppression of competition," Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949), and it has become settled that tie-in sales are per se violations of section 1 of the Sherman Act if the seller has sufficient economic power in the "tying product" (here, the lawyer advertising) and the amount of commerce in the "tied product" (here, the law-directory volumes) is "not insubstantial," See, e.g., Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

A threshold inquiry in tie-in sale cases is whether the tie-in involves a single product or two products. See Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I), 394 U.S. 495, 507 (1969). On this issue, this Court has given only limited guidance in the past, see the opinion of the district court in this case, 505 F.Supp. at 117, n. 7, with the result that the myriad of lower-court federal cases dealing with the issue are wholly in disarray, See Anno., What Constitutes Separate and Distinct Products or Services for Purposes of Determining Whether Tying Arrangement Violates § 1 of the Sherman Act or § 3 of the Clayton Act, 46 A.L.R. Fed. 516 (1980), and with the further result--which occurred in this case--that two separate items, here books and advertising, have been held to be a "single product"

notwithstanding that they were sold, marketed, advertised and accounted-for separately by the seller. The instant Court of Appeals held, in essence, that the seller's act of tying the two products together as to certain buyers, in and of itself rendered them a single economic unit, with the result that the seller's simple act of tying the two products together immunizes the practice from antitrust scrutiny.

In holding Respondent's annual volumes and the advertising therein to be but "one product," as to lawyer advertisers */, the Court of Appeals utilized reasoning nowhere sanctioned by--indeed in express derogation of--the opinions of this Court and of other federal courts

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*/ It will be recalled that nonlawyers may place advertising in the geographical section without having to buy the volumes.

both within and without the Ninth Circuit. The inquiry, said the court below, was whether "the aggregation serves to facilitate competition by promoting product quality or whether it, in fact, amounts to no more than a naked effort to impede competition on the merits." 674 F.2d at 1347. This test of whether a tie-in promotes "product quality" or instead is but a "naked effort to impede competition on the merits" has no case-law support, either cited by the court below or existent. As will be seen, such a rule is wholly at odds with this Court's prior holdings, and represents a startling departure from federal decisional law relating to tie-in sales.

The court below reasoned that since, as to lawyer-advertisers, the mandatory annual purchase of the books provided "guaranteed circulation" to advertisers,

the desirability and saleability of the advertisements was enhanced, resulting in more advertising, and thus more circulation, and so forth. The result was, according to the court, that "the aggregate sale of the Directory and the advertising it contains renders each more effective than if only sold separately." 674 F.2d at 1347-48. Thus, said the court, where "the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller, in the present case, advertising, no tying arrangement is present." Id. at 1348.

The court's analysis is so directly contrary to existing pronouncements of this Court and lower federal courts as to require immediate rectification. In the first place, the opinion below expressly rejects consideration of the

impact of the tie-in upon the consumer's freedom of choice, citing Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1977), 674 F.2d at 1349 n. 19. The Sylvania footnote cited by the Court of Appeals not only does not support its analysis, that analysis completely disregards the much-cited observations of Mr. Justice White, dissenting in Fortner I, supra at 512, that the distortion of "freedom of trade" caused by tie-in sales "injures the buyers of the second product, who because of their preference for the seller's brand of the first [product] are artificially forced to make a less than optimal choice in the second." The circuit courts, as well, have repeatedly given credence to consideration of buyers' freedom of choice as a basis for condemning tie-in sales. See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy,

Inc., 585 F.2d 821 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Bogus v. American Speech & Hearing Ass'n., 582 F.2d 277 (3d Cir. 1978); Ware v. Trailer Mart, Inc., 623 F.2d 1150 (6th Cir. 1980).

Second, the Court of Appeals has wholly discarded as a rationale for condemnation of tie-in sales the so-called "leverage theory," with a citation to a treatise by Professor Bork, The Antitrust Paradox, 373 (1978). Whatever may be the validity of that reference work in another factual context, it is clear that in this case not only does the "leverage theory" have undeniable validity in fact, but it has well-founded legal underpinnings which ought not to be so cavalierly disregarded.

Remarkably, it is the very "leverage" effect of the desired advertising upon

directory sales (and the resultant enhancement of advertisement dissemination), that the lower court points to as rendering this tie-in marketing practice so "effective" in disseminating lawyers' ads and improving the quality of the "single product." As the court below implicitly acknowledges, the tying of the volumes of the advertisements serves to "leverage" the volumes onto more lawyers' bookshelves and the additional resultant sales of volumes in turn "leverages" the advertisements to more lawyer-purchasers. Rather than disproving the leverage theory, this case--indeed the lower court's very analysis of the effect of the tie-in--proves the viability of that theory.

And this tie-in case, unlike most others, involves a double-leverage: The ads sell more books because of the tie-in;

and the greater number of volumes sold in turn enhances the value of the ads. This leads to the most pernicious of tie-in results--a monopolization of both the tying product and the tied product. See 3 AREEDA & TURNER, ANTITRUST LAW §733, at 259-60 (1978). The resultant monopoly, in the market for law-directory advertising and in the market for the law directories themselves, now requires of a potential competitor (because Respondent's tie-in persists due to the rulings of the court below) to gain simultaneous entry into both markets, because with Respondent's tie-in still in effect Respondent's dominance in the one market allows (compels) dominance in the other. See Fortner I, supra at 513 (White, J., dissenting).

Furthermore, only this case discards the "leverage theory"--this Court has

certainly not done so, nor have any other courts including those of the Ninth Circuit. See, e.g., Fortner I, supra at 512-13, White, Jr., dissenting; Betaseed, Inc. v. U & I Inc., 9th Cir., No. 80-3490, decided July 23, 1982; Moore v. Jas. H. Matthews & Co. 550 F.2d 1207 (9th Cir. 1977). In Betaseed, supra Slip Opinion at 3264, the Ninth Circuit Court of Appeals stated that:

> "In Moore, this court discussed at length the rationale for the per se presumptive illegality of tie-ins; the rationale is premised upon the leverage theory. 550 F.2d at 121-1213. Competitors are denied free access to the tied market product, not because the party imposing the arrangement has a superior product but rather because of the power of leverage exerted by the tying product. By conditioning the sale of one commodity on the purchase of another, 'a seller coerces the abdication of the buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the market,'"

quoting Northern Pac. Ry. Co. v. United

States, supra at 10. See also United States v. Loew's, Inc., 371 U.S. 38, 44-45 (1962); Miller v. Ganados, 529 F.2d 393 (5th Cir. 1976); Bowman, Tying Arrangements and the Leverage Problem, 67 YALE L.J. 19 (1957).

Third, the Court of Appeals has completely disregarded the body of law which this Court and others have invariably adhered to in tie-in cases which requires, if there be conditions imposed upon a sale to assure product quality, that those conditions be the least restrictive necessary to effectuate that end. See, e.g., International Business Machines Corp. v. United States, 298 U.S. 133 (1936); International Salt Co. v. United States, 332 U.S. 392 (1947); Anderson Foreign Motors, Inc. v. New England Toyota Distrib. Inc., 475 F.Supp. 973, 984-85 (D. Mass. 1979). Rather than

to require use of the least onerous (to the buyers) means of enhancing directory circulation among lawyers, the court below opted for Respondent's tie-in device to provide "guaranteed" circulation to all advertising lawyers, as a necessary result of the tie-in, thereby obviating Respondent's need to compete "on the merits" with other legal directories for space on lawyers' bookshelves and permitting Respondent to continue with its minimal expenditure of effort to sell its volumes to lawyers ($5,000.00 spent on advertising of directory sales for 38,000 multivolume sets at more than $100.00 per set in 1979).

Fourth, what the Court of Appeals, in reality, did in this case was to allow the Respondent's asserted tie-in sale "justification" to merge the two separate products into one. See discussion in

Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc., supra at 980, 984. This has been occurring in the federal cases with increasing frequency. See, e.g., Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961); Principe v. McDonalds Corp., 631 F.2d 303 (4th Cir. 1980); United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 558-60 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). Respondent's argument justifying the tie-in, which the Court of Appeals accepted, was, in reality, simply that "it works"--it creates a guaranteed-circulation lawyer directory of great quality, which means more advertisers and more circulation and a better product. And because "it works," it is thus justified ("the aggregate sale of ostensibly separate items serves to improve the

quality of the product," 674 F.2d at 1348) and thus there is magically only "one product."

This bizarre result is so totally at odds with this Court's repeated and consistent scrutiny of anticompetitive behavior as to demand that it be forthwith negated. The notion that enhancement of product quality, alone, justifies otherwise anticompetitive behavior and exempts it from the Sherman Act, finds absolutely no support in this Court's decisions in the antitrust field. Rather, this Court has consistently held that it is the operation of a freely competitive marketplace, with competition "on the merits," that is the purpose of the Sherman Act, and that it is by such operation that product quality will be achieved. See, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949); International Business Machines

Corp. v. United States, 298 U.S. 133 (1936).

Finally, a word must be said about the formulation first articulated by the Ninth Circuit in Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), and later quoted in numerous decisions of that circuit and others, see, e.g., Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982); Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), namely that to determine whether several items are a "single product" or "separate products" for tie-in purpose one evaluates the "function of the aggregation." That phrase, which has been used to evaluate a variety of tie-in sales, was also used by the court below in holding that a single product was involved here.

But if "function" be a test in a "one

product" analysis, it would seem at least equally appropriate to weigh the independent functions of the items sold. See, e.g., United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); Moore v. James H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977). And here the items sold by Respondent--advertising in the directories and the directories themselves--have wholly separate functions to the buyer, and are so merchandised by Respondent. The lawyer's advertisement serves to disseminate his or her identity and qualities to other lawyers, while the directory itself is a reference work for looking up other lawyers' identities and qualities. These two functions are not mutually dependent, but are rather wholly independent, and give rise to separate and distinct

product markets which Respondent exploits. See Sobrato v. Prudential Ins. Co., 632 F.2d 786 (9th Cir. 1980). The result is that the instant decision has wholly obfuscated the "function" approach to tie-in analyses by holding, in essence, that the functions merge as to some buyers solely because the products are tied together for sale to those buyers.

The bizarre result of the opinion of the Court of Appeals in this case should call this Court's attention to the kaleidoscopic treatment which the lower federal courts have given to tie-in cases involving questions of "one-product" and "justification." In the thirteen years since this Court last spoke briefly to these issues on the particularized facts of Fortner I there has arisen a startling lack of coherence in the decisional law. See cases cited in Anno., 46 A.L.R. Fed.

516 (1980); Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc., supra; In re Data General Corp. Antitrust Litigation, 490 F.Supp. 1089, 1106 (N.D. Cal. 1980). The result is that there are no meaningful guidelines whatsoever in this area of the law, among the circuits or even within the circuits, to determine whether there is one product or more than one product for tie-in purposes, and whether a tie-in "justification" will in any event merge separate items into a single product.

This case directly raises all of the foregoing issues upon a clear and concise record: The "function" test, the "justification" approach, and the subsidiary economic considerations (leverage theory, consumer-choice, market entry) are ripely presented in this case for disposition, and they are sorely in need

of definitive resolution.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be granted by this Court.

RESPECTFULLY SUBMITTED this 13th day of September, 1982.

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APPENDIX

(a) Opinion of United States Court of Appeals for the Ninth Circuit.

(b) Order of United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing and Rejecting Suggestion of Rehearing en banc.

(c) Opinion of United States District Court for the District of Arizona.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. HIRSH, Appellant, vs. MARTINDALE-HUBBELL, INC., Appellee.	No. 81-5070 D.C. No. CIV 79-226 RMB OPINION

Appeal from the United States District Court for the District of Arizona

Richard M. Bilby, District Judge, Presiding

Argued and Submitted February 4, 1982

Before: ELY, HUG, and ALARCON, Circuit Judges

ELY, CIRCUIT JUDGE:

Robert J. Hirsh, a practicing attorney, brought this antitrust action[1/] challenging certain sales practices of Martindale-Hubbell (hereinafter "Martindale") as violative of § 1 of the Sherman Act (15 U.S.C. §1) and § 3 of the

Clayton Act (15 U.S.C. § 14). [2] Upon the submission of cross motions for summary judgment, the District Court concluded that no violation of those provisions of the antitrust laws had been established and entered summary judgment in favor of Martindale. [3] We affirm.

I. FACTUAL BACKGROUND

Martindale publishes the Martindale-Hubbell Law Directory (hereinafter "the Directory"), the nation's leading annual directory of attorneys and the only directory of its kind expressly approved by the American Bar Association. The Directory, a multi-volume set, contains listings of virtually every American and Canadian lawyer as well as listings of a limited number of foreign attorneys. [4] Martindale distributes the Directory, both nationally and internationally, to

attorneys, law firms, public agencies, private concerns, libraries, and schools.

In addition to its ABA approval, certain other attributes of the Directory render it a particularly attractive forum for attorney advertising. First, the Directory is one of the few law lists containing individual evaluations of the competence and ethics of the attorneys it lists. [5] Second, Martindale offers an attorney the opportunity to publish a broad range of information concerning his educational background and professional achievements. [6] Finally, certain sales practices of Martindale, discussed more fully below, tend to expand circulation of the Directory among attorneys. This expanded circulation greatly enhances the efficacy of advertising in the Directory. [7]

The Directory itself is divided into three sections: the geographic bar roster, the patent lawyer roster, and the biographical section. The geographic and patent lawyer roster contain alphabetical listings, published without charge to the listed party, of individual attorneys and law firms. [8/] Also contained in the geographic and patent lawyer sections are attorney advertisements known as "informative cards." Informative cards are available for purchase by any attorney or law firm, regardless of rating, [9/] and contain information beyond that found in the individual listings. [10/]

The biographical section of the Directory contains additional attorney advertisements known as "professional cards." Professional cards may be purchased only by attorneys and law firms

meeting certain minimum ethical and competency standards, and contain information additional to that found in either the individual listings or the informative cards. Certain information, however, may appear in both the informative and professional cards. 11/

Martindale imposes certain conditions upon the sale of professional and informative cards. First, attorneys wishing to purchase professional or informative cards are also required to purchase the Directory itself. [This requirement will be referred to as "the subscription requirement."] 12/ Second, only attorneys purchasing informative cards are permitted to purchase professional cards. Thus, in order to place a professional card in the Directory, an attorney must also purchase an informative card and subscribe to the

Directory as well.

Under certain circumstances, however, Martindale sells the Directory and advertising separately. No advertising need be purchased in order to obtain the Directory itself. Furthermore, certain classes of attorneys, most notably foreign attorneys and attorneys sharing office space with a subscribing attorney, are permitted to advertise without purchasing the Directory.

Hirsh contends that these sales practices constitute two separate tying arrangements proscribed by § 1 of the Sherman Act (15 U.S.C. § 1) and § 3 of the Clayton Act (15 U.S.C. § 14). 13/ According to Hirsh, the subscription requirement is an illegal tie-in, with the tying product being the advertising and the tied product being the Directory. Hirsh also contends that sales of

informative cards (the tied product) are unlawfully tied to the sale of professional cards (the tying product).

Both Hirsh and Martindale filed motions for summary judgment in the District Court. The Court granted the motion of Martindale and denied that of Hirsh, holding, inter alia, that the functional interrelationship between the Directory and the advertising it contains precludes a finding they are legally separate products.[14] We agree.

II. ANALYSIS

A. Standard of Review

Hirsh appeals the entry of summary judgment in favor of Martindale. In evaluating the propriety of summary judgment, our review is identical to that of the trial court. May Department Store v. Graphic Process Co., 637 F.2d

1211, 1214 (9th Cir. 1980); Securities Exchange Commission v. Murphy, 626 F.2d 633, 640 (9th Cir. 1980). Summary judgment is proper only where no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56 (c); May Department Store v. Graphic Process Co., 637 F.2d at 1214. In the present case, both parties state that there are no disputed issues of material fact. These statements are amply supported by the record. Accordingly, our review here is limited to a determination whether Martindale is entitled to judgment as a matter of law.

B. The Alleged Advertising-Directory Tie.[15/]

In order to establish the existence of an unlawful tying arrangement, four elements must be proved.

First, there must be two separate products involved, the sale of one (the tying product) being conditioned upon the purchase of the other (tied product). Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969) (Fortner I); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352 (9th Cir. 1982). Second, the seller must have engaged in some modicum of coercive conduct toward the buyer. Moore v. James H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977). Third, the seller must possess economic power in the market for the tying product. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 6 (1958). Finally, a "not insubstantial" amount of commerce must be affected by the challenged aggregation. International Salt Co. v. United States, 332 U.S. 392, 396 (1947).[16/] Once these

elements are established, a tying arrangement is presumptively illegal and will be prohibited without a specific showing of anticompetitive purpose or effect.[17/] Id.

"There is, at the outset of every tie-in case, . . . the problem of determining whether two separate products are in fact involved." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (Fortner I). In determining whether an aggregation of items constitutes one or more products for antitrust purposes, we must look to the function of the aggregation. Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971). This necessarily requires an inquiry into the nature of the relationship between the alleged tying product (the advertising) and the alleged tied product (the

Directory). Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1353. In evaluating this relationship, we must consider whether the aggregation serves to facilitate competition by promoting product quality or whether it, in fact, amounts to no more than a naked effort to impede competition on the merits. Our examination of the relationship between the items at issue here leads us to conclude that the Directory and the advertising it contains constitute but a single product.

Martindale offers advertising attorneys a system of legal advertising. The effective operation of that system requires both the printing of information regarding advertising attorneys and the circulation of that information. Through its subscription requirement, Martindale is able to supply both. To

characterize the printing of the information and the circulation of that information as mere separate components of that system is to ignore the practical realities of advertising. See Principe v. McDonald's Corp., 631 F.2d 303, 311 (4th Cir. 1980).

Generally, an attorney advertising in the Directory is seeking to obtain the referral of legal business through the dissemination of information regarding his legal qualifications. In order for this effort to succeed, the attorney's advertisement must reach those persons with legal work available for referral. Because other attorneys are frequently the most productive source of referrals, circulation of the Directory among them is particularly important. Through its subscription requirement, Martindale is able to offer prospective

advertisers a guaranteed circulation among other advertising attorneys. Because circulation is one of the principal determinants of the value of specific advertising space, this guaranteed circulation greatly increases the desirability of advertising in the Directory and tends to spur sales of additional professional and informative card advertising. As more attorneys place advertisements in the Directory, the volume of information contained therein tends to expand. This increased information content renders the Directory itself a more effective tool for persons seeking to refer legal work to others and thereby tends to expand circulation of the Directory. This expanded circulation, in turn, renders advertising in the Directory more desirable by ensuring prospective advertisers a wider

readership. From the foregoing, it is apparent that the aggregate sale of the Directory and the advertising it contains renders each more effective than if only sold separately. We believe this synergistic interrelationship between the Directory and the advertising precludes a finding that they are separate products. "Here, the whole is truly greater than the sum of its parts; it is . . . a different product." Broadcast Music, Inc. v. CBS, 441 U.S. 1, 21-22 (1978). Accordingly, we hold that where, as here, the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller, in the present case, advertising, no tying arrangement is present.

We believe that our holding here is consistent both with the policies underlying the prohibition of tying

arrangements and the previous decisions of this court. We have long recognized that the rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits. Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47. Martindale's subscription requirement is clearly not such a practice. Through the improved product quality resulting from the subscription requirement, Martindale is enabled to compete more effectively in the market for legal advertising.

Hirsh assails the subscription requirement as anti-competitive because it tends to improve Martindale's position in both the market for legal advertising and the market for law directories. This contention is based on a misconception of the operation of the competitive

market system and the policies supporting the legislative preference for that system. Manifestly, Martindale's subscription requirement serves to increase the value to consumers of both the Directory and the advertising it contains. This improved product quality would necessarily tend to expand Martindale's market share.[18/] The antitrust laws, however, are not intended to strike at all practices tending to improve a firm's market position. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Rather, they are designed to strike solely at the use of illegitimate means to obtain that end. Id. Clearly, practices employed to increase the efficacy of a firm's product are not such illegitimate means. Indeed, a major goal of the antitrust law is to promote such practices.

Moreover, the policies underlying the preference for a competitive market system support our result here. A competitive market system is preferred largely because of the widely held belief that competition promotes consumer welfare. See Markovitz, Tie-Ins and Reciprocity: A Functional Legal and Policy Analysis, 58 Texas L. Rev. 1363, 1414 (1980). In the present case, Martindale's subscription requirement tends to promote the welfare of consumers by increasing the effectiveness of both the Directory and the advertising. Under these circumstances, the tie-in doctrine can have no application. See Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 655 (1st Cir.), cert. denied, 368 U.S. 931 (1961).

It is noteworthy that the evils normally associated with unlawful

tying arrangements are conspicuously absent from the case at bar. Tying arrangements are viewed with disfavor principally for two reasons.[19] First, tying arrangements are prohibited because they are thought to facilitate price discrimination. Moore v. James H. Matthews & Co., 550 F.2d at 1213. Where the quantity of sales of the tied product operates as a measure of the buyer's intensity of use of the tying product, the seller may exact a premium from the more intensive users by charging supracompetitive prices for the tied product.[20] The possibility of price discrimination is clearly not present here: Regardless of the amount or type of advertising purchased, the buyer need only purchase one set of the Directory, Moreover, it is undisputed that Directory sales are not profitable. Thus, it is clear that

Martindale is not charging supracompetitive prices for the alleged tied product, the Directory.

A second reason for the law's harsh treatment of tying arrangements is the belief that tie-ins may erect artificial barriers to entry by requiring potential competitors to enter two separate product markets simultaneously.[21] Fortner I, 394 U.S. at 513 (White dissenting). This consideration is clearly not relevant here. Because the advertising is physically contained within the Directory, potential competitors would necessarily be compelled to produce both regardless of Martindale's sales practices.[22]

Because of the synergistic interrelationship existing between the Directory and the advertising, and because the plain effect of the subscription

requirement is to promote rather than impede competition, we conclude that the aggregate sale of the Martindale-Hubbell Law Directory and the advertising contained therein does not constitute an unlawful tying arrangement.

C. The Alleged Professional Card-Informative Card Tie.

As noted above, Martindale sells professional cards only to attorneys who also purchase informative cards. Hirsh contends that this requirement operates as an unlawful tying arrangement. We disagree.

The existence of separate markets for the alleged tying and tied product is crucial to a finding of an unlawful tying arrangement. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); Moore v. James H. Matthews & Co., 550 F.2d at 1214;

Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 253 (4th Cir. 1971). Absent the existence of separate markets, the alleged tying and tied products are, in reality, but a single product. Hirsh failed to establish here the existence of separate markets for informative and professional card advertising. Accordingly, we conclude that the informative and professional cards are not separate products and their aggregate sale does not constitute an unlawful tying arrangement.

In Times-Picayune Publishing Co. v. United States, 345 U.S. 594, the defendant published two separate newspapers. Advertisers were permitted to purchase only combined insertions appearing in both newspapers and were not permitted to advertise separately in either. Id. at 596-97. The Supreme

Court upheld this requirement against a challenge that it constituted an unlawful tying arrangement. Central to the Court's holding was a determination that the readership of both newspapers was identical and therefore separate markets did not exist. The case at bar is indistinguishable. 23/

An examination of the competitive situation confronting Martindale in its efforts to sell professional and informative cards leads inescapably to the conclusion that separate product markets do not exist. In the generic sense, both professional and informative cards constitute "legal advertising." Both appear in the same Directory and operate to generate legal referrals by disseminating information regarding advertising attorneys. Both reach identical audiences. Moreover, in marketing professional cards,

Martindale is confronted by the very same competitors it faces in selling informative cards. We therefore conclude that Hirsh had simply failed to establish that the professional and informative cards are the type of "generically distinct" items necessary for a finding of an unlawful tying arrangement. See Moore v. James H. Matthews & Co., 550 F.2d at 1214.

An evaluation of the competitive impact of the sales practice at issue here supports our conclusion. Because both informative and professional cards are sold in the market for legal advertising, there is no danger to competition on the merits: Prospective advertisers are free to evaluate the value of advertising space offered by Martindale against that offered by its competitors. See Northern Pacific Railway Co. v. United States,

356 U.S. 1, 6. Further, because professional and informative cards are sold in fixed proportion, see Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48, no danger of price discrimination is presented by the challenged aggregation. Nor is the antitrust law's concern with the prevention of the creation of artificial barriers to entry implicated here.[24/] In order to compete effectively with Martindale, potential competitors need only develop a system for attorney advertising equal or superior to that offered by Martindale. Under these circumstances, we conclude that the aggregate sale of professional and informative cards does not constitute an unlawful tying arrangement.

III. CONCLUSION

We have considered Hirsh's

remaining contentions and find them unworthy of discussion. Our analysis of the sales practices at issue here leads us to conclude that Hirsh has failed to establish the existence of any unlawful tying arrangement. In particular, we hold that the Martindale-Hubbell Law Directory does not constitute a product separate from the advertising it contains. We further hold that the professional and informative cards do not constitute separate products for the purposes of the antitrust laws.[25/] Accordingly, the judgment of the District Court is AFFIRMED.

FOOTNOTES:

1. Hirsh originally sought to bring this suit as a class action. Based upon the stipulation of counsel, however, application for class action status was withdrawn until after trial on the issue of liability.

2. Hirsh also contends that Martindale's sales practices violate § 2 of the Sherman Act (15 U.S.C. §2). That claim, however, is still pending before the court below and is not presently before us.

3. Pursuant to Fed. R. Civ. P. 54(b), the District Court determined there was no just cause for delay and directed entry of summary judgment on the claims under § 1 of the Sherman Act and § 3 of the Clayton Act. These claims are therefore properly before us despite the fact that Hirsh's claim under § 2 of

the Sherman Act is still pending below.

4. The Directory also contains information regarding the ABA, certain uniform laws, and the statutory laws of certain jurisdictions.

5. Martindale assigns letter values to attorneys based on information obtained from judges, other attorneys, and other sources in the community where the attorney practices. The highest attainable rating is "AV" with the "A" representing Martindale's evaluation of the attorney's legal skills and the "V" representing Martindale's evaluation of the attorney's ethics, reliability and diligence.

6. An attorney may publish, inter alia, information concerning his areas of specialization, membership in legal and honor societies, professional honors and awards, educational background,

publications and military service.

7. It appears that other attorneys are generally the most productive source of referrals.

8. These listings set forth the attorney's name, address, date of birth, and dates of undergraduate and law degrees.

9. In contrast, professional cards may be purchased only by attorneys and law firms rated "BV" or higher. See note 5 supra.

10. Informative cards contain information regarding the attorney or law firm such as the telephone number and zip code of the attorney or firm, names of partners and associates in the firm, areas of specialization, references, and representative clients.

11. Areas of specialization, references, and lists of representative

clients may appears in both the professional and informative card.

12. As noted below, certain classes of attorneys are exempted from the subscription requirement.

13. Hirsh also contends that these practices violate § 2 of the Sherman Act (15 U.S.C. §2). That claim, however, is not before us and we express no opinion regarding its merits. See note 2 supra.

14. The District Court also held that Hirsh's Clayton Act claim was barred because advertising is not a "commodity." See Clayton Act § 3 (15 U.S.C. § 14). Because we conclude that the advertising and the Directory are a single product, we need not consider the propriety of that ruling here.

15. Our analysis here applies to both the requirement that purchasers

of informative cards purchase the Directory and the requirement that purchasers of professional cards purchase the Directory.

16. A minority of courts, however, require a showing of some sort of anticompetitive effect in the market for the tied product. See, e.g., Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974); Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir.), cert. denied, 419 U.S. 1022 (1974).

17. Tie-ins differ from other per se illegal practices, however, in that, under certain circumstances, the tie may be legally justified. See Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961).

18. Martindale's sales of

advertising have increased steadily in the past. According to at least one commentator, this is indicative of a pro-competitive effect in the market for legal advertising, the alleged tying product. See Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 21 (1981).

19. Two additional reasons have been asserted in support of the anti-trust law's harsh treatment of tying arrangements. First, it has been argued that tying arrangements permit sellers with monopoly power in the tying product market to extend this monopoly power into a second market. See, e.g., International Salt Co. v. United States, 332 U.S. at 396. This, the so-called "leverage theory," has been largely discredited by economists, primarily because modern

economic thought indicates that all available monopoly profits could be obtained from the tying product alone without the use of a tie-in. See R. Bork, The Antitrust Paradox, 373 (1978). Second, tying arrangements are disfavored because they intrude upon consumers' freedom of choice by compelling the purchase of unwanted products. See, e.g., Moore v. James H. Matthews & Co., 550 F.2d at 121-13. This rationale has been implicitly rejected by the Supreme Court as a sufficient independent basis for antitrust liability. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21, 58-59.

20. For a more complete discussion of how tying arrangements facilitate price discrimination, see Markovits, supra, 58 Texas L. Rev. at 1378-80.

21. At least one commentator, however, has suggested that tying arrangements do not necessarily erect barriers to entry. See Markovits, supra 58 Texas L. Rev. 1363, 1419-22 (1980).

22. Hirsh places great weight on the fact that, under certain circumstances, Martindale sells the advertising and the Directory separately. Hirsh contends that these separate sales establish that the Directory and the advertising contained therein are separate products. We disagree. Martindale sells advertising separately only to foreign attorneys and attorneys sharing office space with a subscribing attorney. Because foreign attorneys are less likely to refer legal work to domestic attorneys, and, because attorneys sharing office space with a subscribing attorney already have access

to the Directory, application of the subscription requirement to them would serve no valid purpose. Thus, Martindale's policy of excepting these attorneys from the subscription requirement constitutes a reasonable effort to limit application of the requirement to those situations where it would effectuate its underlying purpose. We fail to see how such a limitation can render an otherwise permissible practice unlawful.

23. Indeed, the facts of the present case are even stronger in support of a finding that no unlawful tying arrangement exists. In Times-Picayune, the advertising appeared in two separate newspapers, an afternoon edition and a morning edition. Thus, at least a plausible argument existed that there were separate markets involved. In the present case, no such argument exists

because both advertisements appear in the same Directory.

24. The analysis here is identical to that employed above in evaluating the subscription requirement.

25. Nothing contained in this opinion is to be construed as expressing any view on the merits of Hirsh's pending claim under § 2 of the Sherman Act.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. HIRSH, Appellant, vs. MARTINDALE-HUBBELL, INC., Appellee.	No. 81-5070 D.C. No. CIV 79-226 RMB ORDER

Before: ELY, HUG and ALARCON, Circuit Judges

The judges constituting the panel originally concerned with the subject case (Ely, Hug and Alarcon) have voted unanimously to deny the Petition for Rehearing. Judges Hug and Alarcon have voted to reject the suggestion for rehearing en banc, and Judge Ely has recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROBERT J. HIRSH, on his own behalf and on behalf of all others similarly situated,	
Plaintiff,	No. CIV 79-226 TUC-RMB
vs.	ORDER
MARTINDALE-HUBBELL, INC.,	
Defendant.	

This case involves allegations by plaintiff-attorney Robert J. Hirsh that defendant Martindale-Hubbell, Inc., ties the purchase of professional cards to the purchase of its multivolume legal directory in violation of the antitrust laws. This action involves cross motions for summary judgment on the issue of per se liability under section 1 of the Sherman Act. 1/

A tie-in is an arrangement in which a party sells one product on the condition that the buyer also purchase a different product.[2] If certain elements exist, tying arrangements are presumptively illegal without a specific showing of any unreasonable restraints of trade or anticompetitive effect.[3] Once a buyer has established the existence of a tie-in, a seller violates section 1 if the party possesses sufficient economic power in the tying product market appreciably to restrain competition in the tied product market and if a not insubstantial amount of interstate commerce in the tied market is effected.[4] A tie-in necessarily involves two separate, distinct products because the essence of its unlawfulness is the use of the dominant product to compel the purchase of a second distinct product.[5]

Because the court finds that the professional card and the directory are not separate, distinct products, plaintiff's motion for summary judgment is denied as a matter of law and defendent's motion for summary judgment is granted as a matter of law. 6/

Defendant annually publishes the Martindale-Hubbell Law Directory. The 1979 edition consists of seven volumes. Six of the volumes contain listings of virtually all American and Canadian attorneys and of certain attorneys for foreign countries. The seventh volume contains concise digests of the statutory laws of the several states, the federal government, the Canadian government and provinces, and several foreign countries, various uniform laws and the ABA "redbook." The volumes containing the law lists are divided into the

Geographical Bar Roster, the Patent Lawyers' Roster and the Biographical Section. The geographical and patent lawyers sections consist of individual, alphabetical listings by cities of individual attorneys and law firms compiled and published at no charge to the parties listed and of informative cards that can be purchased by any practicing attorney or law firm and that provide information additional to that contained in the individual listings. The biographical section contains professional cards that can be purchased only by attorneys and law firms who attain an "av" or "bv" rating under the Martindale-Hubbell rating system and that provide information additional to that appearing in either the individual listings or the informative cards.

Martindale-Hubbell has a

subscription requirement policy; defendant requires, as a condition of purchase by a lawyer or law firm of a professional card in the biographical section or of an informative card in the geographical section, that the buyer also purchase the law directory itself. A purchaser of a professional card must also purchase an informative card in each annual directory in which one's professional card appears. To maintain a professional card each year, an attorney must purchase the directory each year. Martindale-Hubbell exempts two groups of attorneys from the subscription requirement; foreign attorneys may purchase advertising space without subscribing to the directory as may "av" and "bv" rated attorneys who share office space with other attorneys one of whom subscribes to the directory.

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Martindale-Hubbell sells the directory by itself to lawyers, public agencies, libraries, businesses, and other purchasers. Generally, lawyers must buy the entire directory. Defendant will only sell individual volumes of the directory to entities who have already purchased the entire directory. Defendant also sells individual law digest volumes to certain purchasers, but not to attorneys. Martindale-Hubbell advertises the sale of its directory independently of the sales of the advertisements. In 1979, Defendant spent approximately $5,000 on advertising the directory. The circulation of the Martindale-Hubbell Law Directory in 1979 was 38,358.

Defendant itemizes the cost of the directory, the professional card and the informative card as separate

components of the total price of the subscription. In 1979 the prices were as follows: the price of the directory was $110; the price of an informative card was $10 for a card charge and $17 per attorney in the card up to twelve attorneys; the price of a professional card was $65 per one-sixth of a page; the price of an individual volume of the directory was $90. The price for the directory remained $110 regardless of whether the purchaser bought advertising or merely the directory. When plaintiff purchased his professional card in 1979, he paid a total of $366: $110 for the directory plus $61 for the informative card (three attorneys) plus $195 for the professional card (three-sixth of a page).

Additionally, defendant maintains separate itemized costs of manufacturing the directory and of soliciting

advertising. Defendant also maintains separate income figures derived from the sales of the directory itself and from the sales of the advertising within the directory.

Plaintiff contends the professional card and the directory are wholly separate products; they are created separately, they are priced separately, and they are sold separately. Additionally, plaintiff argues the items are functionally distinct: the professional card provides attorneys with a means of disseminating information about themselves to an audience while the directory provides lists of and information about other attorneys. Plaintiff characterizes the alleged tying agreement as an arrangement whereby to purchase one's advertisement, one must purchase back everybody else's advertising.

Moreover, Plaintiff points out that economically Martindale-Hubbell treats the sale of advertising and the sale of the directory separately on its accounting books.

Defendant claims that under the "function of the aggregation" test for product separability, if two items together form one functional unit, no tie-in exists. The function of the professional card and the directory is to generate referrals for the advertisers. This function requires both advertising and circulation of the directory. Defendant offers prospective customers an established and guaranteed circulation; the circulation makes the advertising space valuable. Thus, the circulation generated by the subscription requirement is an integral part of a single economic unit that operates as a lawyer

information and referral service. Defendant relies on Pricipie v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), in which the court maintained the following:

> Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie in exists as a matter of law.

Id. at 309.

The Ninth Circuit court examines the "function of the aggregation" to ascertain whether a package of separable items should be regarded as one or more products for tie-in purposes. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1215 (9th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), cert. denied, 405 U.S. 955

(1972). [7/] Hence, in Seigel v. Chicken Delight, Inc., the court, maintaining that a trademark merely reflects goodwill and quality standards, held that common items were distinct from and not essential to a trademark because the trademark did not protect the items used, but, rather, protected how they were used and the resultant product. 448 F.2d at 49. The Ninth Circuit court also has maintained that the existence of dual markets is crucial to a finding of distinct products. Sobrato v. Prudential Insurance Co. of America, No. 78-2570 (9th Cir. Oct. 14, 1980); Moore v. Jas. H. Matthews & Co., 550 F.2d at 1214. The court has reiterated, however, that considerations such as legitimate cost savings and whether the items are normally sold or used as a unit in fixed proportions would relieve an aggregation

of separable items from being "generically" distinct. Moore v. Jas. H. Matthews & Co., 550 F.2d at 1215.

If there were no Martindale-Hubbell Law Directory, there would be no professional cards. Hence, the directory is essential to and not distinct from the professional card because the professional card derives its existence from the directory. Moreover, when an advertising attorney uses the law directory, the attorney typically uses both the biographical and the geographical sections. If an attorney needs to refer work to a lawyer in an unfamiliar legal community, the referring attorney usually will look at the listing of attorneys in the geographical section to find the names of therated attorneys in a particular town. The referring attorney will then turn to the professional cards

in the biographical section to garner background information on the attorneys to facilitate the choice of an associating attorney. Likewise, when an attorney receives a referral from an unfamiliar attorney, the referred attorney will look up the referring attorney in the geographical section to determine the attorney's rating and in the biographical section to ascertain the attorney's background. The Court thus finds that the professional card and the directory function as a single unit and the subscription requirement of Martindale-Hubbell does not run afoul of Section 1 of the Sherman Act. 8/

SO ORDERED this 7th day of January, 1981.

RICHARD M. BILBY
UNITED STATES DISTRICT JUDGE

FOOTNOTES:

1. The Court does not address the issue of liability under section 1 of the Sherman Act under a rule of reason analysis. Although the defendant off-handedly raised the issue by advancing a unilateral-refusal-to-deal argument, the issue was not properly or adequately presented to this Court. The Court finds that this argument is inapplicable to a per se tying analysis. Additionally, the defendant's assertion--unilateral activity, whatever its purpose or effect, cannot violate section 1--is refuted by Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 624-26 (1953).

2. E.g., Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14 (1953); Moore v. Jas. H. Matthews & Co.,

550 F.2d 1207, 1211 (9th Cir. 1977).

3. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1211 (9th Cir. 1977).

4. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1212, 1214 (9th Cir. 1977).

5. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).

6. Defendant conceded that its subscription requirement affected a not insubstantial amount of commerce.

Because the product separability issue disposes of the motion, the Court need not address the economic power issue.

In its decision, the Court is not relying on the opinion of Professor Richard Posner expressed in his affidavit submitted by the defendant.

7. Although the Supreme Court has never established standards by which to determine product separability, the Court has identified factors of particular arrangements which were determinative. In Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), the Supreme Court found no tying arrangement to exist where the products were indistinguishable because, the products being identical and their market the same, no dominant tying product existed to exert leverage in one market to the exclusion of sellers

in another. Id. at 614. In Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I), 394 U.S. 495 (1969), however, the Court found a tie-in where the amount of credit extended by one corporation was conditional on the purchase of products from a separate corporation and was in excess of the sum of money needed to procure those products. Id. at 507.

8. The physical layout of the directory is irrelevant to the decision of this Court. The result would be the same if the professional cards were in volumes separate from the remainder of the directory. Both the professional cards and the directory are used for the same purpose--to place information regarding attorneys in an accessible format.

82-570

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SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT J. HIRSH,	)	
	)	
Petitioner.	)	ON WRIT OF
v.	)	CERTIORARI TO
	)	THE UNITED
MARTINDALE-HUBBELL,	)	STATES COURT
INC.,	)	OF APPEALS FOR
	)	THE NINTH
Respondent.	)	CIRCUIT
	)	

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

With exceptions immaterial to the resolution of the issues presently before the Court, Respondent Martindale-Hubbell, Inc. ("Martindale-Hubbell") concurs with Petitioner's Statement of the Case and Statement of Facts.

REASONS FOR DENYING THE WRIT

Petitioner brought this action against Martindale-Hubbell alleging, inter alia, that Martindale-Hubbell is engaged in "tying" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The alleged tying arrangement is Martindale-Hubbell's "subscription requirement." The subscription requirement is a policy of Martindale-Hubbell pursuant to which each contract for the purchase of advertising space for a

"professional card" also includes the purchase of a subscription to the Directory. Advertising is the alleged tying product, the Directory is the alleged tied product, and the subscription requirement is the alleged tie-in.

The principal issue addressed by the courts below was whether the Martindale-Hubbell Law Directory (the "Directory") and advertising therein constitute one product or two separate products. In order to resolve this issue, the lower courts analyzed the "function of the aggregation." App. 10, 47 (citations to the opinions of the courts below are to the Appendix to the Petition for Writ of Certiorari) (quoting Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), cert. denied 405 U.S. 955 (1972)). Martindale-Hubbell urged

and the courts below found that the Directory and advertising therein function together to generate referrals for advertising attorneys. App. 11, 46. Law firms place "professional cards" (essentially ethical display advertising) in the Directory, which are then circulated to other lawyers who receive the Directory. Professional cards are the advertising; the Directory is the medium. The value of the advertising depends directly upon the circulation of the Directory. The larger the circulation of the Directory among likely sources of law business, the more valuable the advertising. The subscription requirement assures each advertising lawyer that his advertisement will be circulated to every other advertising lawyer. The subscription requirement thereby enhances the

value of professional cards to advertisers and potential advertisers.

The purpose of the subscription requirement is decidedly not simply to sell more Directories. It is admitted that Martindale-Hubbell loses money on every directory it sells.[1] App. 18.

Thus, the Directory and advertising function as a single commercial unit--a lawyers' advertising and referral service. Without adequate circulation of the Directory, the advertising space would be less

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[1] This is not unique or even unusual among publishers of advertising media. Both news magazines and newspapers, for example, depend upon advertising revenue to support themselves. The most striking illustration of this phenomenon is commercial television, which is literally given away in order to create a widely distributed advertising medium.

valuable, and without the advertising the Directory would be less valuable. See App. 13. The courts below therefore concluded that professional cards and the Directory constitute a single product.[2]

This Court has not previously considered an alleged tying arrangement involving items so functionally interrelated as to constitute a single product. Lower court decisions, however, are consistent

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[2]Petitioner has repeatedly urged, here and in the courts below, that this reasoning is somehow circular, that is, that the tie is being used to justify the tie. Petition for Cert., 26, 35-37. This is false. That the value of the advertising depends directly on the circulation of the Directory is an undisputed fact. The subscription requirement merely recognizes and accommodates this reality by combining the sale of these commercially and economically inseparable components.

with the holding in this case.

In Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961), defendant manufactured and sold patented silos and unloaders for feed and grain storage. Because of a high incidence of complaints concerning the unloader when it was not used in conjunction with defendant's silo, defendant refused to sell unloaders except to those who also purchased or already owned silos of defendant's manufacture. The trial court directed a verdict in favor of defendant. The Court of Appeals affirmed.

> We may agree with the plaintiff that the compulsory joining of two "separate" articles is a per se violation of the Act . . . . Articles, though physically distinct, may be related through circumstances.

> The sound business interests of the seller, or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. . . . Whatever may be meant by per se, we must first consider what may fairly be treated by a seller as inseparable.
> 292 F.2d at 655.

In Principe v. McDonalds Corp., 631 F.2d 303 (4th Cir. 1980), plaintiffs, franchisees of defendant, alleged that defendant's policy of requiring franchisees to lease premises for their restaurants from defendant constituted an unlawful tying arrangement. The court analyzed defendant's business methods and marketing approach in detail and concluded that the trademark, the premises, and the method of doing business were so interrelated as to constitute a single product.

> . . . [T]he modern franchisee pays not only for the right to use the trademark but for the right to become a part of a system whose business methods virtually guarantee his success. . . .
>
> . . . Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie-in exists as a matter of law. . . .
>
> * * *
>
> . . . To characterize the franchise as an unnecessary aggregation of separate products tied to the McDonalds name is to miss the point entirely.
> 631 F.2d at 309, 311.

See also Kugler v. Aamco Automatic Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 560 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

Thus, the holding of the Court of Appeals in this case that "where, as here, the aggregate sale of ostensibly separate items serves to improve the quality of the product offered by the seller, in the present case, advertising, no tying arrangement is present" (App. 14) is neither unprecedented nor in conflict with other lower court decisions.

In support of his contention that this case warrants review by this Court, Respondent challenges two statements contained in footnote 19 of the opinion of the Court of Appeals. This footnote is appended to a discussion of two reasons tying arrangements have been viewed with disfavor. The footnote simply examines two additional reasons--intrusion upon consumers' freedom of choice and the "leverage

theory"--and rejects them. If the lower courts had found that Martindale-Hubbell's subscription requirement constitutes a tying arrangement, this reexamination of the rationale for prohibiting such arrangements might have been pertinent. But in view of their ultimate conclusion that no tie exists, the observations challenged by Petitioner are nothing more than obiter dicta and, therefore, do not require or merit this Court's review.

Petitioner's final contention is that the courts below incorrectly applied the "function of the aggregation" test. Petition for Cert., 38-40. This contention, even if it were true, would provide no basis for review by this Court. Numerous courts confronted with this issue have examined the functional interrelationship of the components present in order to

determine whether separate products are involved. See, e.g., Moore v. James H. Matthews & Co., 550 F.2d 1207, 1214-15 (9th Cir. 1977); Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252-54 (4th Cir. 1971); Telex Corp. v. International Business Machines Corp., 367 F. Supp. 258, 347-48 (N.D. Okla. 1973), aff'd in part, rev'd in part on other grounds, 510 F.2d 894 (10th Cir.), cert. dism'd 423 U.S. 802 (1975). See also Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). To review each of these decisions to assure complete uniformity of application would be impossibly time-consuming and would little advance the interpretation of the antitrust laws. This dispute, although important to the parties directly involved, has no

particular public significance. Therefore, the remote possibility that both courts below erred in determining that only one product is present in this case does not warrant review by this Court.

For the foregoing reasons, Respondent requests that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED this 8th day of October, 1982.

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